Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN E. HAYES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE AN INDICTMENT IS SEALED FOR ALMOST FIVE YEARS, WHILE THE GOVERNMENT SEEKS TO LOCATE, APPREHEND AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, SHOULD A COURT ANALYZING WHETHER, FOR SPEEDY TRIAL PURPOSES, THE DELAY IS CHARGED AGAINST THE GOVERNMENT, EVALUATE ONLY WHETHER THE GOVERNMENT WAS EXERCISING REASONABLE DILIGENCE TO APPREHEND THE CODEFENDANT; OR, MORE PROPERLY, SHOULD IT DETERMINE WHETHER THE GOVERNMENT'S EFFORTS TO CAPTURE THE CODEFENDANT WERE REASONABLY LIKELY TO RESULT IN A PROMPTLY-HELD TRIAL FOR THE AVAILABLE DEFENDANT, WHO IS UNAWARE OF THE PENDING SEALED CHARGE?

II.

WHERE AN INDICTMENT IS SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, IN ORDER THAT THE GOVERNMENT CAN UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, IS THE AVAILABLE DEFENDANT'S FAILURE TO MOVE TO DISMISS THE INDICTMENT ONCE UNSEALED, AND HIS SUBSEQUENT REQUEST TO HAVE THE CASE DECLARED "COMPLEX" UNDER THE SPEEDY TRIAL

QUESTIONS PRESENTED FOR REVIEW – Continued

ACT, 18 U.S.C. § 3161 *ET SEQ.*, IN ORDER TO PREPARE TO DEFEND AGAINST THE CHARGES, SOME OF WHICH RELATED TO EVENTS 15 YEARS EARLIER, FATAL TO A FINDING THAT HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS VIOLATED?

III.

DID THE COURT OF APPEALS ERR UNDER *DOGGETT V. UNITED STATES*, 505 U.S. ___ (1992), BY NOT PRESUMING PREJUDICE TO PETITIONER, FROM THE DELAY RESULTING FROM AN INDICTMENT BEING SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, INVOLVING SOME ALLEGATIONS THEN UP TO FIFTEEN YEARS OLD, WHERE THE DELAY OCCURRED SO THAT THE GOVERNMENT COULD UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, AND DURING THE DELAY, THE MAGISTRATE THEN SUPERVISING THE CASE MADE NO INQUIRY AS TO HOW THE DELAY IMPACTED ON THE RIGHT TO A SPEEDY TRIAL FOR PETITIONER, WHO WAS AVAILABLE FOR TRIAL DURING THE ENTIRE PERIOD?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

United States of America
John E. Hayes, Jr.
Frederick G. Thom (yet to appear)
Ronald Wilson (District Court only)
Rome Finance Company (District Court only)

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REPORT OF THE OPINIONS OF THE ELEVENTH CIRCUIT

The opinion of the Eleventh Circuit Court of Appeals is reported at *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994). (App. 1) The order of the Court of Appeals denying rehearing and the suggestion of rehearing *en banc*, filed March 2, 1995, is unreported. (App. 12)

STATEMENT OF SUPREME COURT JURISDICTION

The sentencing of Petitioner and entry of judgment occurred on January 29, 1993. His conviction was affirmed by the Court of Appeals on December 20, 1994. On March 2, 1995, the Court of Appeals denied Petitioner's request for rehearing and rehearing *en banc*. The Court of Appeals stayed its mandate until May 22, 1995, pending Petitioner's application to this Court.

This Court's jurisdiction to review the Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF PROCEEDINGS AND DISPOSITION

On March 9, 1987, in the Newnan Division of the Northern District of Georgia, Petitioner Hayes was indicted along with Frederick G. Thom in a four count indictment, charging two counts of wire fraud, one count of interstate transportation of stolen property (ITSP), and conspiracy to violate both the wire fraud and ITSP statutes. *United States v. Hayes*, No. CR-87-2-N. (R1-1)[1]

The indictment was sealed on that date. (R1-3) Hayes was not advised that the indictment had been returned, nor arrested on it.

On February 9, 1988, a superseding indictment was filed in the Atlanta Division of the Northern District of Georgia. *United States v. Hayes*, No. CR-88-65-A. (R1-5) In addition to Petitioner and Thom, it named Ronald Wilson and Rome Finance Company (Rome) as defendants. It alleged three counts of wire fraud, two counts of ITSP, conspiracy to violate the wire fraud and ITSP statutes, one count of retaliating against a witness, and one count of obstruction of justice. The superseding indictment also was sealed. (R1-6) None of the defendants were aware of

[1] The District Court record is referred to as "R(volume)-(page number)."

its return. The Newnan Division indictment was transferred to the Atlanta Division.

On January 16, 1992, the superseding indictment was unsealed. (R1-12) On February 5, 1992, Hayes appeared on a summons and entered pleas of not guilty to all counts of the superseding indictment. (R1-14)

Hayes, Wilson and Rome were tried by a jury commencing on November 2, 1992. The District Court granted Hayes' motion for judgment of acquittal on Counts 4 and 5, and partially as to Count 6, the conspiracy count, and those motions as to all charges against Wilson and Rome. (R2-59)

On November 23, 1992, Petitioner was found guilty by the jury of Counts 1, 2, 3 and 6 of the superseding indictment, and acquitted of Counts 7 and 8. (R2-65)

On January 28, 1993, the District Court sentenced Hayes on Counts 1 and 3 to 37 months in custody, and on Count 2 to 46 months in custody, consecutive to Counts 1 and 3. Imposition of sentence on Count 6 was suspended, and Hayes was placed on probation for 5 years. The court imposed a $21,000.00 fine and a special assessment of $100.00. (App. 16)

Petitioner timely appealed to the United States Court of Appeals for the Eleventh Circuit, whose jurisdiction was invoked under 28 U.S.C. § 1291, conferring jurisdiction upon a court of appeals to hear a direct appeal in a criminal case. On December 20, 1994, the Eleventh Circuit affirmed Hayes' conviction. *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994). (App. 1) On March 2, 1995, that court denied Petitioner's request for rehearing and rehearing *en*

banc. (App. 14) On March 22, 1995, the court stayed issuance of the mandate for 60 days pending application to this Court for review. (App. 16)

STATEMENT OF FACTS

The offenses of which the jury convicted Petitioner were alleged in the initial and superseding indictments to have been committed between January 1, 1977 and approximately December 31, 1982. The gist of the fraudulent scheme and conspiracy alleged was that Hayes and codefendant Fred Thom defrauded United States investors of funds to be invested in foreign precious metals, commodities and currency transactions conducted in Europe, mainly Switzerland.

The initial indictment was sealed upon the motion of the Government, on the grounds that Thom was a foreign national who was believed to be living in Zimbabwe. The Government represented in its sealing application that it sought to seek the arrest and extradition or deportation of Thom by Zimbabwean or other authorities, if he was found outside of that country, and it was "estimated that these arrangements would require that the seal remain in effect for approximately 3 months." (R1-3-1)

On February 9, 1988, almost 11 months later, without having secured the arrest or extradition of Thom, the Government filed the superseding indictment. (R1-5) Contemporaneously, the Government applied to the Magistrate to seal the indictment so that Thom, still allegedly in Zimbabwe, could be apprehended. The Government alleged that the Zimbabwean Government had advised

the American Embassy that it was *considering* the Government's request for Thom's deportation. (R1-6) (emphasis added)

As it had since June, 1987, the Government continued to file, at the Magistrate's order, at approximate three month intervals, *ex parte* and under seal reports concerning the status of Thom's fugitiveness. (App. 21 through 54) Summarized as follows, the reports provided:

Date:	*Summarized Contents of Reports:*
3/87	First indictment filed and sealed; no report.
6/87	No extradition treaty between U.S. and Zimbabwe; Britain will act on behalf of U.S.; no prediction of when this could be accomplished. (App. 21)
9/87	In 8/87, British and Zimbabwean officials met. No information about meeting. (App. 23)
12/87	(Filed 2/22/88) In 9/87, Zimbabwe said it would consider deporting Thom, and requested details on Thom and charges. This was done, but no response. (App. 25)
2/88	Superseding indictment filed and sealed; no report.
5/88	In early April, 1988, Zimbabwe advised U.S. of problems that could delay or block deportation or extradition. "Different" avenues being explored, and by mid-summer should know if they will succeed. (App. 27)
8/88	"Foreign government officials" acting for U.S. were to visit Zimbabwe to try to secure that country's cooperation. Zimbabwe's decision expected in 60 days. (App. 29)

11/88 Zimbabwe said it would help, but Thom fled country. U.S. now searching foreign countries for him. (App. 31)

2/89 Thom may have re-entered Zimbabwe. Zimbabwe asked to investigate. Meeting scheduled in 2 weeks. (App. 33)

5/89 Thom not located and whereabouts unknown. Zimbabwe would consider extradition request if made by British. British assistance anticipated. (App. 35)

8/89 [No reference to British] Thom reportedly living in Zimbabwe. U.S. plans to meet in a few days with officials to determine if he is there, and if so, seek his arrest and deportation or extradition. (App. 37)

12/89 Formal inquiry to be filed next week as to whether Thom was in Zimbabwe. Interpol notices were filed in September. (App. 39)

3/90 Zimbabwe says Thom is not there; British say otherwise. Inquiries to be made of Thom's relatives in Zimbabwe. Interpol notices still outstanding. (App. 41)

6/90 Zimbabwean Justice Minister suggested Thom's extradition if asked for by Britain. (But see 6/87 report which alleged the same thing.) Possibility to be explored with Britain. Interpol notices still outstanding. (App. 43)

9/90 Interpol says Thom is vacationing in England; provisional arrest warrant filed. Are discussing possible British request to Zimbabwe for extradition. (App. 45)

12/90 Extensive British efforts in England failed to locate Thom there; information is that he is back

in Zimbabwe. U.S. requests that discussions with British re: extradition continue. Also exploring "advisability" of direct negotiations with Thom's Zimbabwean attorney. (App. 47)

3/91 Formal request made to British to intercede on U.S. behalf. Decision whether to contact Thom's lawyer held in abeyance. (App. 49)

6/91 British advise U.S. to hire lawyer in England to block Thom's assets there; suggested as more practical and expeditious than deportation. (App. 51)

11/91 No funds traceable to Thom are found in England. Opportunity arose in October in matter of interest between U.S. and Zimbabwe for a renewal of request for extradition. (App. 53)

1/92 Motion to unseal filed; "[r]ecent international developments indicate that there no longer is a need to maintain the indictment under seal." (R1-12)

Hayes was first informed of the indictment in January 1992 when it was unsealed, and he appeared with former counsel at his arraignment shortly thereafter. At no time during the pendency of this case before the District Court did former counsel allege that the 58 month delay between the initial indictment and its unsealing violated Hayes' rights under the Speedy Trial Clause of the Sixth Amendment. These claims were made first on appeal to the Eleventh Circuit by undersigned counsel.

The indictment alleged basically two different schemes. It first alleged that Hayes and Thom, from 1977 until 1982, executed a scheme to defraud by representing

to investors that their funds would be invested in foreign precious metals and commodities transactions. Second, it alleged that Hayes, Thom and codefendants Wilson and Rome executed a scheme to defraud investors in a Nevada gold mine operation in the mid-1980's.

As to the allegations relating to the latter endeavor, however, the trial judge granted Hayes', Wilson's and Rome's motions for judgment of acquittal as to those portions of the substantive and conspiracy charges relating to it. Ultimately, the jury convicted Hayes of the substantive and conspiracy charges relating to the purported 1977 to 1982 scheme with Thom. It found him not guilty of charges of intimidating a witness and obstruction of justice, allegedly occurring in 1987 and 1985, respectively.

After sentencing and filing a notice of appeal, Petitioner hired undersigned counsel. Hayes then contended before the Court of Appeals that the lengthy delay between indictment and its unsealing violated his Sixth Amendment Speedy Trial rights. Having failed to raise the issue below, Petitioner acknowledged that he only could succeed if he showed that the Sixth Amendment error was plain and affected his substantial rights. On that point, the Eleventh Circuit agreed. *United States v. Hayes*, 40 F.3d 362, 364 (11th Cir. 1994). (App. 3-4)

The court below evaluated Hayes' speedy trial claim under those factors set forth by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972). The Eleventh Circuit recognized that the length of the delay triggered review of the other three *Barker* factors, but did not address whether the length of delay caused Petitioner any more than the

amount of presumed prejudice necessary to trigger a *Barker* analysis. However, it held, based on the reports summarized above, that the Government exercised diligence in attempting to secure Thom for trial.[2] Accordingly, the appellate court did not hold the delay against the Government, and did not hold that prejudice to Petitioner due to the delay was presumed. (App. 7)

The appeals court further weighted the third *Barker* factor against Petitioner, since he did not assert his right to a speedy trial before the District Court (although he had contended, unsuccessfully, that certain substantive charges were barred by the statute of limitations (R1-28)); and because he successfully moved to have the trial court declare his case "complex" under the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.* (R1-30) (App. 8)

Finally, because the Eleventh Circuit did not hold the period of delay against the Government, it placed upon Petitioner the burden to show actual and specific prejudice, and concluded that he did not. (App. 8)

The court denied Petitioner a rehearing, and this application follows.

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[2] The Eleventh Circuit incorrectly noted, from where we do not know because it is not in record, that Thom had been deported from England. *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994). In fact, Thom remains in England, on bond, contesting extradition, to this date.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. Certiorari is warranted, because the Eleventh Circuit incorrectly failed to distinguish between a particular defendant's absence, which results in delay in bringing him to trial, and where it is the fugitiveness of a codefendant which delays another, but present, defendant's trial; that is, where an indictment is sealed for 58 months so that the Government can try to apprehend a fugitive foreign national codefendant, the standard for determining whether the reason for the delay is charged against the Government for Sixth Amendment Speedy Trial analysis is not whether the Government exercised "reasonable diligence" in trying to bring the fugitive to justice, but, rather, whether it was reasonably likely that the fugitive would be brought to justice promptly, since the latter standard takes into account the Speedy Trial rights of the available defendant.

This case presents an issue rarely, if ever, discussed in constitutional Speedy Trial jurisprudence, that is, what is the obligation of the courts and the Government under the Sixth Amendment's Speedy Trial guarantee to bring a defendant promptly to trial, when significant delay results from a codefendant's fugitiveness. In this case, during the 58 month delay between Petitioner's indictment and his first appearance in court to face the charges, there apparently was no consideration by the Magistrate whether the delay implicated Petitioner's right to a Speedy Trial.[3]

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[3] In the Northern District of Georgia, Magistrates initially are in charge of pretrial proceedings prior to a defendant's arraignment and the assignment of the case to a District Judge.

The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . " The right attaches upon formal indictment. *United States v. Marion*, 404 U.S. 307, 320 (1971). The Speedy Trial guarantee is regarded as "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have the charges promptly exposed." *Dickey v. Florida*, 398 U.S. 30, 37 (1970). Its importance is reflected by this Court's placement of the primary burden on the courts and prosecutors to assure that cases are brought to trial. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).[4]

Violations of this fundamental right generally are evaluated by considering whether the delay between indictment and trial was uncommonly long; whether the Government or the defendant is more to blame for the delay; whether, in due course, the defendant asserted his right to a speedy trial; and whether the defendant suffered prejudice as the delay's result. *Barker, supra*, 407

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[4] Petitioner notes that the question presented fairly includes the inquiry ordered briefed in *Doggett v. United States*, 502 U.S. ___, 112 S.Ct. 631, 116 L.Ed.2d 601 (1991), but left unresolved by the opinion in *Doggett v. United States*, 505 U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), that is, whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the Clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of a criminal defendant?

U.S., at 530; *Doggett v. United States*, 505 U.S. ___, ___, 112 S.Ct. 2686, 2690 (1992). None of the four factors are a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial. Rather,

> "[T]hey are related factors and must be considered together with such other circumstances as are relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

Barker, supra, 407 U.S., at 533 (footnote omitted).

In *Doggett*, this Court reversed the Eleventh Circuit, which had required Doggett to prove actual prejudice resulting from the eight and one-half year delay between his indictment and arrest. The *Doggett* opinion reiterated that affirmative proof of particularized harm is not essential to every speedy trial claim, noting *Barker*'s explicit recognition that impairment of one's defense through time's erosion of exculpatory evidence and testimony is the most difficult form of speedy trial prejudice to prove, "because what has been forgotten 'can rarely be shown.' " *Doggett, supra*, 112 S.Ct., at 2692-93; *Barker, supra*, 407 U.S., at 532. Similarly, despite Petitioner's failure to raise the claim in the trial court, the Eleventh Circuit failed to presume prejudice from the lengthy delay in unsealing the charges against him and bringing him to trial.

As this Court recognized in *Doggett*, the length of delay is doubly significant. It triggers judicial analysis if

the Government has prosecuted a defendant with less than "customary promptness." 112 S.Ct., at 2690-91. In addition, once the threshold of sufficient delay has been established and judicial inquiry is necessary, "the presumption that pretrial delay has prejudiced the accused intensifies over time." 112 S.Ct., at 2691. The instant period of delay is nearly five times as long as that deemed necessary to trigger judicial review. *Doggett, supra*, 112 S.Ct., at 2694 and 2691, n. 1 Here, the court below merely recognized the first facet of delay: that judicial inquiry was therefore mandated. *Hayes, supra*, at 365. It erroneously afforded no presumptively prejudicial effect to the 58 month delay.

Second, and most important, the Eleventh Circuit's refusal to afford a presumption of prejudice to Petitioner due to the length of the delay was compounded when that court required that the Government only exercise "reasonable diligence" in its efforts to secure the presence of Thom. Since the court found the Government's actions proper *vis-a-vis* Thom, for purposes of its *Barker* analysis, it chose not to weigh the delay, though lengthy, against the Government.

However, that conclusion ignored the seminal obligation of a court to insure that an indicted defendant is brought to trial promptly, as required by *Barker, supra*, 407 U.S., at 529. Unlike *Doggett*, where the record is silent as to any court involvement prior to Doggett's apprehension, in this case the Magistrate presumably reviewed, without further inquiry, the Government's 17 status reports. The case style of each one of these reports listed Petitioner as an indicted defendant, but during the pendency of the indictment between 1987 and 1992, there

was no consideration of his Sixth Amendment rights or how they were affected by this ongoing delay.

Consequently, the decision below which limited the Government's obligation to reasonable diligence in its search for the fugitive (which Petitioner contends was not satisfied), ignored the Government's equal, if not greater, obligation to promptly bring to trial the available defendant, Hayes. Particularly with regard to this reason, neither *Barker* or *Doggett* provide a complete framework within which to decide this case.

The typical constitutional Speedy Trial analysis focuses only on the two affected parties: the Government, with consideration of its reason for the delay, and the defendant, with regard to whether his conduct contributed to the delay, or whether he demanded a trial or acquiesced in its delay. As to this, *Doggett* is more helpful than *Barker*, since in the former case, as here, the defendant was unaware that he had been charged with a crime. But, whereas Doggett was "unavailable" due to the Government's inability or meager efforts to find him, Hayes always was available. The charges remained sealed while the Government purportedly searched for Thom.

The incongruity and imperfection of the Court of Appeals' test that the Government had to exercise just "reasonable diligence" to capture Thom over the course of 58 months, is exposed when one imagines that, under the same facts, it is Thom who claims his Sixth Amendment rights were infringed upon, even if he was unaware that someone (including a disaffected investor) was after him. [Keep in mind, during the course of the conduct alleged in the indictments, Thom resided out of the

United States. He was a foreign national and thus there was little, if any, likelihood that he would voluntarily appear to answer charges.] Under the Eleventh Circuit's standard, the same test of prosecutorial obligation applies, regardless of whether it is the infringement of the fugitive's or the available defendant's Sixth Amendment rights which are evaluated.

Clearly, what is reasonable when the focus is only on the sought-after defendant and what is reasonable when the speedy trial rights of a "third party" defendant are involved is constitutionally different. The Government can be reasonably diligent in attempting to locate a fugitive, even one unaware of the dragnet for him, such that when he is ultimately apprehended after a long period of time and put on trial, his Sixth Amendment rights have not been infringed. After all, *Doggett* likely would have been decided differently if the Government was not negligent or at least more diligent in its pursuit. That same governmental diligence, assuming it was diligence, over an extended period of time, such as here, does little to preserve an available defendant's constitutional right to a prompt airing of the charges.

Thus, completely absent from the appeals court's reasoning was consideration as to how the Government's zeal or lack thereof in bringing Thom to justice (which still has not been accomplished) fulfilled its duty to promptly try Hayes. As to the reasonableness of the Government's efforts, the Eleventh Circuit held that the indictment was sealed because the Government feared that Thom would frustrate its attempts to secure his arrest and deportation if he were aware of it. That may have been a valid reason for sealing it in the beginning. It

certainly is a valid consideration for a single defendant case, or for a limited period of time. However, contrary to the statements in the opinion below, the Government's status reports did not demonstrate, certainly after the first few, that there was any reasonable expectation of success in obtaining jurisdiction over Thom at any time, much less promptly. *Hayes, supra,* at 366.

More glaring is the lack of indication in the reports that the Government was actively pursuing Thom in such a manner so that it was possible for the Magistrate and the Government to conclude that it was reasonably likely that the fugitive would be brought to justice promptly, so as to afford *Hayes* a speedy resolution of the charges the Government had lodged against him. In fact, there is nothing in the record supporting a conclusion that the Magistrate to whom the reports were provided ever made an inquiry, critical or otherwise, as to the status of Thom's fugitiveness or its effect on the court's obligation to provide Petitioner a speedy trial.

It was obvious to even the most uncritical observer, by November 1988, over 18 months after the return of the Newnan indictment, that Thom knew that someone was after him (and for whatever reason, he made himself scarce), and he fled Zimbabwe. The underlying reason for the seal order, to keep Thom unaware in the hopes of his apprehension, surely had been undermined. An eye towards Hayes' rights would have recognized that Thom's capture was unlikely. At least by May 1989, when Thom's whereabouts were unknown, a critical jurist receiving the reports would have questioned the Government on its ability to make good on its now 26 month old promise to have Thom in the dock within three months.

By then, at a minimum, consideration of the effect of this prolonged delay on Hayes' Sixth Amendment rights should have begun.

Petitioner certainly was not in a position to challenge the Government's diligence or to assert that he be given a speedy trial, since he was unaware of the charge. "In exceptional circumstances, especially in criminal cases, [ ] courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *United States v. Olano*, 507 U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). There was absolutely nothing fair about this 58 month old sealed indictment, alleging as it did crimes which occurred more than a decade before, with unchallenged *ex parte* status reports being fed to the Magistrate. The Magistrate should have inquired further, and ultimately imposed a deadline to have the indictment unsealed, with or without Thom. He did not. That is the plain error of this case.

In *Doggett*, the focus was on what the Government did to locate and prosecute the defendant. The court below in this case characterized the Government's action in *Doggett* as having made no efforts to prosecute the defendant during the delay, in contrast to its views of the Government's efforts here. *Hayes, supra*, at 366. However, similar to *Doggett*, the Government in fact made no effort to prosecute *this Petitioner*. This failure was compounded by the absence of an indication at any time that it was likely that Thom would be brought to justice promptly. The Government had no lock on his general or specific

whereabouts, much less whether any host government would ultimately cooperate with the United States to secure his deportation. Whatever efforts were made, and we contend that they were minimal and unrealistic to promptly secure Thom's presence, there was never a consideration of whether there was progress such that Thom would promptly become available, so that Hayes' trial would commence shortly. It is undisputed that there was no effort to bring John Hayes to trial prior to January 1992.

Further, in finding that "[t]here always appeared a reasonable expectation of success in obtaining jurisdiction over Thom, and the Government was diligent in its efforts to do so," *Hayes, supra,* the court below stretched the record and ignored illustrative precedent in its own circuit. In *United States v. Khoury,* 901 F.2d 948, 973 (11th Cir. 1990), the issue was whether the period of delay while the Government sought the apprehension of a co-defendant was reasonable, such that it could be excluded under the Speedy Trial Act. While hesitatingly concluding that the entire period of time was excludable because the delay there (18 months) was "reasonable," the *Khoury* Court held that "the length of delay such as that here is not reasonable . . . in the absence of a showing by the Government that it is *actively continuing to pursue the fugitive and believes in good faith that the fugitive will be brought to justice promptly.*" *Id.* The Government's efforts here, as recorded in the status reports, do not reflect, after the first or second year at a maximum, that Thom reasonably could be secured for trial at all, much less secured "promptly."

Although there is limited guidance in the caselaw on this issue, courts have on occasion, at least in dicta, recognized the limits of endless delays while codefendants are secured. The Eleventh Circuit's predecessor, the former Fifth Circuit, in *United States v. DeTienne*, 468 F.2d 151, 157 (5th Cir. 1972), noted that "on the scale of possible justifications for the delay this reason deserves some deference," but further stated that the Government's "pragmatic desire to try the participants in a criminal scheme together hardly warrants unquestioning acceptance when pitted against a single defendant's right to a speedy trial."

Moreover, in *United States v. Garner*, 529 F.2d 962, 967 (6th Cir. 1976), the court, while condoning the delay of one year in that case, stated that the district's standard practice of attempting to apprehend all codefendants indicted in a case before commencing trial, "would not justify an excessive delay."

As we noted below, there are no cases which countenanced delay even close to the period here in which the Government attempted to secure a codefendant. In comparison to the reported cases on delays attendant with fugitive codefendants, the delay here, and the expectation that it would end soon, were unreasonable.

In *United States v. Tranakos*, 911 F.2d 1422, 1428 (10th Cir. 1990), relied upon by the Eleventh Circuit, a delay of eight months due to a codefendant's unavailability was not held against the Government.

In *United States v. Richard*, 943 F.2d 115 (1st Cir. 1991), which discussed the proper purpose of the sealing of an indictment under Fed.R.Cr.P. 6(e), the sealing was proper

where the Government was concerned, due to pretrial publicity, that some of the defendants would have fled if they knew of the indictment. The period of delay from indictment to unsealing was just under seven months.

United States v. Muse, 633 F.2d 1041 (2nd Cir. 1980), also not a speedy trial case, concerned the propriety and length of sealing of an indictment. There, the indictment was sealed for a mere 16 months. In *United States v. Lyles*, 593 F.2d 182, 196, n. 17 (2nd Cir. 1979), the delay was 13 months. Finally, in *United States v. Edwards*, 777 F.2d 644 (11th Cir. 1985), the propriety of sealing an indictment for 16 *days* was held not to offend the applicable statute of limitations.

Thus, these cases provide no support for the appeals court's conclusion that the Government's efforts, and presumably the Magistrate's acquiescence, were reasonable. While some period of delay could properly be viewed as reasonable under the circumstances, a close review of the status reports reflect no real activity, and more important, no consideration of how the rights of the available defendants, including Hayes, were impacted. This is all the more important since the main allegations of the superseding indictment concerned activities which had occurred almost ten years prior to the ultimate unsealing of the indictment.

The court below relied on *United States v. Tranakos*, *supra*, in holding that the delay occurring until the Government gave up on securing Thom would not be held against the Government. Besides the fact that the true delay there was minimal when compared to Petitioner's case, in *Tranakos*, while the codefendant was a fugitive,

Tranakos and the other defendants were aware of the indictment against them, and were actively seeking its dismissal (on grounds other than Speedy Trial). Tranakos was indicted in February 1983. The opinion noted for purposes of the Speedy Trial Act, all delay until the codefendant's availability in 1986 was excluded (although elsewhere in the opinion it is apparent that the fugitive was on the run for only eight months). Contrary to the present matter, *Tranakos* was not a case where the remaining defendants were unaware of the proceeding against them. Eight months after indictment in that case, the district judge dismissed the indictment for prosecutorial misconduct. The available defendants were in fact actively challenging the charges, an opportunity Hayes was not afforded while the Government sought Thom's apprehension. *Tranakos* was clearly not illustrative of the proper rule to apply here.

In fact, Congress has delineated a difference in the Speedy Trial Act between the rights of a defendant being personally pursued, and a defendant whose trial is delayed due to a fugitive codefendant. Under 18 U.S.C. § 3161(h)(3)(A), any period of delay resulting from the absence or unavailability of the defendant (or an essential witness) is excludable from the Act's time calculations. On the other hand, despite Congress' preference for joint trials, under 18 U.S.C. § 3161(h)(7), only a reasonable period of delay is allowed when a defendant's trial is postponed due to his joinder with "a codefendant as to whom the time for trial has not run . . . ," i.e., is a fugitive.

The Sixth Amendment right to a speedy trial is a personal right. It can be waived, but only knowingly.

Barker, supra, 407 U.S., at 525-526. That is why, in part, any evaluation of whether the Government acted with diligence in securing the presence of a fugitive codefendant must include consideration of how the delay attendant to those efforts affected the available defendant. This is all the more necessary where the available defendant is unaware of the charges himself, and cannot intervene and point out the laggardness of the Government's efforts, the unrealistic belief that the fugitive will soon be caught, or the adversity which the delay causes him.

It therefore is incumbent on this Court to require, in sealed delays due to the absence of a codefendant, that the Government establish that its efforts lead to the reasonable likelihood that the fugitive will be brought in promptly. Otherwise, the search for the fugitive must of necessity give way to the Sixth Amendment rights of the available defendant. The indictment must be unsealed, the available defendant tried, and the search for the fugitive may then proceed.

In sum, we contend that the court below gave insufficient effect to the period of delay, and how it operated in and of itself to presume prejudice for speedy trial purposes. In addition, the court failed to adequately take into consideration that the delay was totally not the fault of Petitioner, and that, despite the fugitive codefendant, the Magistrate, to whom the Government status reports were submitted, and the Government had an independent duty to provide Petitioner with a speedy trial. For these failures, prejudice to Petitioner should have been presumed.

Accordingly, this Court should grant the writ of certiorari and reverse the judgment of the Court of Appeals.

II. The Court of Appeals improperly weighted Petitioner's failure in the trial court to move to dismiss the indictment on Speedy Trial grounds.

Under *Barker*, a defendant's failure to assert a right to a speedy trial is just one of the factors to be considered in an inquiry into the deprivation of that right. *Barker, supra*, 407 U.S., at 528. In fact, *Barker* warned against assuming a waiver from a silent record. That presumption runs afoul of the requirement of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), that a waiver of a constitutional right only occur by an intentional relinquishment or abandonment of a known constitutional right or privilege. A court should indulge every reasonable presumption against waiver and not presume acquiescence in the loss of fundamental rights. *Barker, supra*, 407 U.S., at 525-526.

Moreover, this Court further acknowledged in *Barker* that in considering a failure to assert a right to a speedy trial, a court should attach different weight, for example, to a situation where a defendant knowingly fails to object, than to a situation where his attorney acquiesces in a long delay without informing his client. That language demonstrated that *Barker* primarily anticipated the traditional speedy trial problem, where the defendant was aware of the proceedings against him, and his post-accusation conduct is reviewed to determine whether or not he wanted a speedy resolution of the charge or if he merely failed to complain about the prosecution's delays, since prompt disposition of his case might not have been in his best interest. *Barker*'s admonition that a "defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant *is being* [emphasis added] deprived of the right

[such that] failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," 407 U.S., at 531-532, fundamentally must apply to the defendant who sits back *while* the delay is ongoing, and not necessarily to one who discovers the delay after it has occurred.

On the other hand, Petitioner had no choice as to whether the indictment was sealed for 58 months, until the Government gave up on Thom and chose to proceed against the available defendants. Admittedly, Hayes should have complained at that time to the trial court. But from his silence does not flow acquiescence or agreement with the delay, since he had no prior say in whether it should continue, and his subsequent silence is no proof of concurrence. It would be mere sophistry to conclude that Petitioner's failure to complain at trial compromised his already ripe claim. Unlike most speedy trial cases, where the scrutinized period of delay frequently is accompanied by a defendant's silence or a request for continuance, Petitioner did not consent or acquiesce in the 58-month delay between indictment and arraignment. Suddenly, he was faced with defending himself against a massive indictment involving, in major part, charges as to his activities which at a minimum ceased a decade ago. It belies this Court's experience to conclude that any defendant would knowingly fail to assert a speedy trial objection for some strategic or other reason. [That is why he raised it, once aware, on direct appeal.]

Under these circumstances, the court below should have assigned the least possible weight against Petitioner for his failure to complain below. *See, Dickey v. Florida*, 398 U.S. 30, 40, 48 (1970) (Brennan, J., concurring) (noting

that relevance of a defendant's failure to assert a right to a speedy trial goes to the cause-of-delay category). *See also, Barker, supra,* 407 U.S., at 530 n. 30 ("In essence, however, there is little difference between [Justice Brennan's] approach and the one we adopt today.")

Moreover, a constitutional Speedy Trial claim may exist despite no violation of the Speedy Trial Act, or by logical extension, a temporary waiver of or exclusion from its protections. *See, United States v. Bloom,* 865 F.2d 485, 491 (2nd Cir. 1985). The court below viewed as relevant to whether Petitioner asserted his Sixth Amendment rights Petitioner's request (consented to by the Government) that the case be declared "complex" under the Speedy Trial Act, in order that he be provided time to prepare to defend at trial conduct, some of which stretched back 15 years or more in time. In so doing, the Eleventh Circuit ignored the fact that *Barker* rejected the contention that failure to assert the right is an automatic forfeiture of his claim. *Barker, supra,* 407 U.S., at 528.

If, as we contend, Petitioner's failure to raise his Sixth Amendment claim at trial under these circumstances should be given little weight, then his request to have the case declared "complex" under the Speedy Trial Act should be given no weight at all. After all, the responsibility to bring a defendant to trial is the prosecution's. *Barker, supra,* 407 U.S., at 527. Unlike most speedy trial cases, where the scrutinized period of delay frequently is accompanied by a defendant's silence or a request for continuance, Petitioner did not consent or acquiesce in the 58-month delay between indictment and arraignment. All he did once arraigned was ask for some additional time, to which the Government agreed (R1-53),

to prepare to defend against these ancient, complex charges, once he was made aware of them.

This action does not militate whatsoever the Government's previous, unconscionable delay. While some delay in complex cases is reasonable, the delay in disclosing the fact of indictment was not due to its complexity. Declaring it complex extended the case no more than six months. Moreover, this was not a simple, straightforward prosecution like that in *Doggett*. To name only a few reasons, the case involved voluminous documents; the Government relied on expert testimony to explain the gold commodities market; and the trial itself spanned 13 days, not including intervening weekends.

Accordingly, the Court should grant the petition on the grounds that the Eleventh Circuit improperly weighted Petitioner's failure to assert a Speedy Trial violation until his appeal.

III. Since the length of the delay was presumptively prejudicial and the Government must be charged for the reason for delay, despite Petitioner's failure to assert his claim until appeal, prejudice to Petitioner resulting from the 58-month delay should have been presumed.

The Eleventh Circuit failed to recognize the presumption of prejudice flowing from the lengthy delay. *Doggett, supra,* 112 S.Ct., at 2693. Further, by not attributing the reason for the delay to the Government, the court below failed to distinguish this case from one where the defendant himself is the fugitive. From these two improper conclusions, the Eleventh Circuit further erred by

improperly placing upon Hayes the burden of showing specific prejudice flowing from the Sixth Amendment violation. Where the delay is lengthy and is charged against the Government, prejudice is presumed. *Doggett, supra,* 112 S.Ct., at 2694; *United States v. Shell,* 974 F.2d 1035, 1936 (9th Cir. 1992). The Eleventh Circuit, besides grounding its burden allocation on erroneous application of the *Barker* factors, also held that assigning the burden in this fashion was particularly true were the standard of review is plain error. However, "plain error" exists where a forfeited error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young,* 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson,* 297 U.S. 157, 160 (1936)). It does not change the burden of proof with regard to the underlying forfeited error. A violation of the speedy trial protection is an error which affects a defendant's substantial rights, and thus prejudice is presumed. *Olano, supra; Arizona v. Fulminante,* 499 U.S. 279 (1991); *United States v. Chandler,* 995 F.2d 1073, 1086 (1993).

As this Court recently reiterated in *Doggett,* the most difficult sort of prejudice to show is impairment of one's defense due to the erosion of time. *Doggett, supra,* 112 S.Ct., at 2692-2693. After all, one cannot be expected to recall what one has forgotten. Shifting the burden to Hayes was particularly unjustified given the long period of delay in the case, since presumptive prejudice increases with the length of the delay. *Id.,* at 2693. Even if the Court might conclude that in its initial stages, there is no basic distinction between delay occasioned by a fugitive defendant as opposed to a fugitive codefendant, the delay here was almost five times greater than that which

has presumed to cause prejudice. At some point in time, crossed in this case long before January 1992, enough time had elapsed for the Government to secure Thom or put Hayes on trial without him. Moreover, regardless of when the unreasonable delay should have been halted by the Magistrate or the Government, none of the delay in this case was Hayes' fault. It therefore should not be held *against* him.

We note that even if the Eleventh Circuit was correct in making Hayes demonstrate prejudice, the trial record reflects that he was prejudiced. He was acquitted either by the trial judge or the jury of all the more recent charges, relating to the Nevada gold mine and alleged witness intimidation and obstruction of justice. His convictions were based on the activities from 1977 or earlier to 1982, charges which were extremely close to being barred by the statute of limitations when the indictment was returned, but sealed.

Further, at trial, Hayes' right hand assistant, Joan Rose, the key "insider" to testify for the Government, on cross examination by defense counsel could not remember the purpose of certain money transfers which were her responsibility, and which the Government sought to portray as ill-gotten funds. Through her, the defense tried to show the jury that the money wired was unrelated to investor funds, and thus to the scheme to defraud which was alleged. (R7-34 to 37, 55 to 56) She did not deny that the monies were unrelated; she simply could not recall one way or the other. Hayes was convicted on these wires, which occurred in March 1982. A more true reflection of *Barker*'s adage that "what has been forgotten can rarely be shown," *Barker, supra*, 407 U.S., at 532, may not exist.

Accordingly, the Court is respectfully requested to grant the petition, and reverse the judgment of the Court of Appeals.

CONCLUSION

Petitioner hesitates to repeat the words of then-Associate Justice Rehnquist in his dissent in *Steagald v. United States*, 451 U.S. 204 (1981), who noted that he did not wish to "cry 'wolf'," 451 U.S., at 230, because the reversal there rested on a very special set of facts. Thus, despite his dissent, Justice Rehnquist anticipated that the impact of the Court's reversal there likely would not have much influence.

At first blush, this case would appear to rest on a very special set of facts. As such, this case, particularly since *Doggett* has reinvigorated lower courts' appreciation of the Speedy Trial Clause, may not be repeated to any degree in another case. On further study of the opinion below, however, it likely will have substantial impact in multiple defendant cases, where delay frequently results in sealed indictments and absent defendants. As such, there is good reason for the Court's guidance and corrective hand. Only this Court can repair the erroneous application of the *Barker/Doggett* considerations by the court below.

Therefore, Petitioner John E. Hayes, Jr., respectfully requests the Court to grant his petition for a writ of

certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

John E. HAYES, Jr., Defendant-
Appellant.

No. 93-8144.

United States Court of Appeals,
Eleventh Circuit.

Dec. 20, 1994.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. 1:88-cr-65-1, Robert L. Vining, Jr., J., of wire fraud, interstate transportation of money taken by fraud, conspiracy, threatening witness, and obstructing grand jury investigation. Defendant appealed. The Court of Appeals, Hill, Senior Circuit Judge, held that: (1) five-year delay from time of indictment to time of trial did not violate defendant's due process rights; (2) five-year delay between indictment and trial did not violate defendant's right to speedy trial; and (3) district court's erroneous exclusion, on attorney-client privilege grounds, of tax attorney's testimony did not prejudice defendant so as to constitute reversible error.

Affirmed.

Lenny Franco, Alan Baverman, Atlanta, GA, for appellant.

Donald B. Mackay, John G. Moon, Ellen R. Meltzer, Central Station, U.S. Dept. of Justice, Crim. Div., Fraud

Section, Washington, DC, Amy Weil, Asst. U.S. Attys., N.D. Georgia, Atlanta, GA, for appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

HILL, Senior Circuit Judge:

In this case we decide whether a delay of five years from the time of indictment to the time of trial violates Appellant John E. Hayes' right to a speedy trial and to due process of law. We also review the district court's exclusion of certain evidence on the grounds of attorney-client privilege. For the following reasons, we affirm Hayes' conviction.

I. BACKGROUND

On March 9, 1987, a grand jury returned a four-count indictment against Hayes and co-defendant Frederick G. Thom. The indictment charged the defendants with participating in a purported tax shelter scheme to defraud hundreds of investors in the United States through grantor trusts and fictitious commodities transactions involving precious metals on foreign markets.[1] On February 9, 1988, a superseding indictment was filed against Hayes and Thom, which added several defendants to the case

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[1] The defendants were charged with wire fraud, in violation of 18 U.S.C. § 1343; interstate transportation of money taken by fraud, in violation of 18 U.S.C. § 231 [sic]; and conspiracy to commit the substantive offenses, in violation of 18 U.S.C. § 371.

and also charged Hayes with threatening a witness and obstructing a grand jury investigation.[2]

Each time the indictments were returned, upon motion of the Government, the district court ordered that they be placed under seal to facilitate Thom's apprehension. Thom was a foreign national residing in Zimbabwe at the time. The court ordered the Government to file a status report at least every 90 days detailing its efforts to secure Thom's arrest and extradition.

The Government's efforts were unsuccessful, and on January 16, 1992, the district court granted its motion to unseal the superseding indictment. Hayes was arraigned on February 5, 1992. On March 10, 1992, he requested that his case be certified as complex litigation pursuant to 18 U.S.C. § 3161(h)(8)(B)(ii), and waived his rights under the Speedy Trial Act "in the interest of allowing [Hayes] time to adequately prepare a defense." His motion was granted on March 11, 1992. On September 17, 1992, the district court excluded the period between June 1 and November 2, 1992, in computing the time within which the trial had to commence.[3]

II. STANDARD OF REVIEW

Since the issue was not raised before the district court, we review the alleged violation of Hayes' right to

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[2] Hayes was charged with violations of 18 U.S.C. § 1513 and § 1503.

[3] At the time of Hayes' trial, Thom was still a fugitive. On June 9, 1993, Thom was arrested in the United Kingdom. The government filed an extradition request on August 2, 1993.

due process of law and a speedy trial for plain error. *United States v. Olano*, ___ U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). We review the trial court's evidentiary ruling [sic] for abuse of discretion.

III. DISCUSSION

A. *Due Process of Law and Speedy Trial*

Hayes can succeed on claims initially raised here only if he can show that there was error, that the error was plain, and that it affected his substantial rights, i.e., the error affected the outcome of the district court proceedings. *Olano*, ___ U.S. at ___-___, 113 S.Ct. at 1777-78; *see also* Fed.R.Crim.P. 52(b). We do not correct a forfeited error unless it " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392 80 L.Ed. 555 (1936)). Plain error is reversed only in the case "in which a miscarriage of justice would otherwise result." *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982).

1. *Due Process of Law.* Hayes claims he was denied due process of law by the Government's undue delay in indicting him. He testified before the grand jury in December 1984 and was told he was a target, but the first indictment was not filed until March 1987, five years after the offenses for which he was convicted.

To establish a due process violation based on preindictment delay, a defendant must show that the reason for the delay "violates our fundamental conceptions of

justice." *United States v. Lovasco*, 431 U.S. 783, 790-91, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977); *see also United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971). In this circuit, the defendant must show that he suffered substantial prejudice and that the delay was the product of deliberate action by the Government to gain a tactical advantage. *United States v. Young*, 906 F.2d 615, 620 (11th Cir.1990); *see also United States v. Benson*, 846 F.2d 1338, 1341 (11th Cir.1988); *Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir. 1985).

Hayes does not allege that the Government intentionally delayed the indictment against him in order to gain a tactical advantage. There is also no evidence in the record that it did so. On the contrary, it is undisputed that the investigation was ongoing during the three years after Hayes testified before the first grand jury. Hayes admits that he was offered an opportunity to testify before a successor grand jury in 1987, and was told that the scope of the investigation had expanded. There is no due process violation where delay is the result of the need for further investigation, even if the defendant may have been somewhat prejudiced by the lapse of time. *Lovasco*, 431 U.S. at 794-96, 97 S.Ct. at 2051-52; *see also Benson*, 846 F.2d at 1342-43 (no violation even though eight-year investigative delay prejudiced defendant); *Stoner*, 751 F.2d at 1543 (nineteen-year delay presumed proper absent any evidence that state delayed for purpose of harassment). Hayes' right to due process of law was not violated.

2. *Speedy Trial.* The five-year delay between the indictment and the trial is more troublesome. The

Supreme Court has set out a four-part test for determining whether the delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. *Id.* at 530-33, 92 S.Ct. at 2192-93.

a. *Length of the delay.* The delay in this case of five years is sufficient to trigger a careful review of the other three *Barker* factors required to establish a violation of the right to speedy trial.

b. *Cause of the delay.* The Government has a duty to make a diligent, good faith effort to bring an indicted defendant to trial promptly. *Smith v. Hooey*, 393 U.S. 374, 383, 89 S.Ct. 575, 579-80, 21 L.Ed.2d 607 (1969). Nevertheless, an allegation of unconstitutional delay must be evaluated by the facts of each particular case. *United States v. Marion*, 404 U.S. at 325, 92 S.Ct. at 466.

The Government's reason for sealing the indictment and delaying trial against Hayes was a valid one. The Government was attempting to apprehend Hayes' co-defendant, Thom, who was living in Zimbabwe. The indictment was sealed because the Government feared that Thom would frustrate its attempts to secure his arrest and deportation if he were aware of it.

During the subsequent five years, the Government exercised diligence in attempting to persuade the Government of Zimbabwe to arrest and deport Thom. In January of 1992, having determined that its efforts would

not be successful (although we note that the Government ultimately did secure his arrest in and deportation from England), the Government moved to unseal the indictment and proceeded to trial against Hayes.

This is not a case where the Government made no efforts to prosecute the defendant during the delay. *Cf. Doggett v. United States*, ___ U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). On the contrary, during the period of delay, the Government made persistent and documented efforts to prosecute Thom. Between June 1987 and November 29, 1991, the Government filed seventeen reports describing, *inter alia*, its efforts to have the United Kingdom intercede on behalf of the United States; repeated requests to Zimbabwe through the American Embassy and the U.K. to effect Thom's arrest and extradition or deportation; the filing of notices on Interpol's computer system; inquiries to the Zimbabwean Embassy concerning Thom's whereabouts; discussions between the U.K. and the United States concerning a request for extradition if Thom were deported to Britain; the filing of a provisional arrest warrant in the U.K.; and attempts by the United States to locate Thom in several other foreign countries.

Even though these efforts caused a lengthy delay in prosecuting Hayes, the Government's persistence in trying to locate Thom was not unreasonable. There always appeared a reasonable expectation of success in obtaining jurisdiction over Thom, and the Government was diligent in its efforts to do so. Under these circumstances, the delay in prosecuting Hayes will not be held against the Government. *See United States v. Tranakos*, 911 F.2d 1422, 1428 (10th Cir.1990).

c. *Demand for speedy trial.* A defendant has the "responsibility to assert a speedy trial claim." *Barker,* 407 U.S. at 529, 92 S.Ct. at 2191. The "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532, 92 S.Ct. at 2193. Hayes concedes that at trial he neither challenged the post-indictment delay by filing a motion to dismiss the indictment, nor made a demand for a speedy trial at that time. In fact, Hayes successfully moved to have the district court declare his case complex, further delaying his trial. These actions undercut Hayes' claim of error of constitutional magnitude, and militate against a finding that the delay was plain error.

d. *Prejudice to the defendant.* In cases involving lengthy delay, prejudice may be presumed. *Doggett,* ___ U.S. at ___, 112 S.Ct. at 2693. Where the Government has pursued its prosecution with reasonable diligence, however, specific prejudice must still be shown. *Id.* This is especially true where the delay is reviewed only for plain error. *Olano,* ___ U.S. at ___, 113 S.Ct. at 1778. Hayes argues that one witness was unable to recall certain events in her trial testimony. Beyond this, he asserts only a vague allegation that he was prejudiced by the "erosion of exculpatory evidence and testimony."

Such conclusory allegations do not establish the required showing of prejudice to prevail under the plain error standard. This court has consistently held that conclusory assertions of prejudice, including unsubstantiated allegation of witnesses' faded memories, are insufficient to constitute proof of actual prejudice. *See e.g., Young,* 906 F.2d at 620; *United States v. Russo,* 796 F.2d 1443, 1451 (11th Cir.1986).

We conclude that Hayes' right to a speedy trial was not violated.

B. *The Evidentiary Rulings*

Hayes' defense rested in large part upon his claim that he had acted in good faith reliance on Thom's representations that their business venture was entirely legitimate. Hayes wanted to argue to the jury that he also was a victim of Thom's fraudulent scheme.

To this end, Hayes sought to introduce the testimony of the tax attorney he had hired to represent the grantor trusts. Hayes wanted the attorney to tell the jury how he had tried to contact Thom on numerous occasions to secure documentation from him regarding the commodities transaction and other aspects of the investment scheme.

The Government persuaded the district judge to exclude this testimony on the grounds that it would violate the attorney-client privilege of the hundreds of other investors in the grantor trusts who were also represented by the attorney. Hayes claims this application of the privilege was error. It is apparent that this testimony, if believed, would have provided some support for his defense of good faith reliance on Thom.

As is not unusual when counsel have persuaded a trial judge to err – asserting, of course, that a contrary ruling would have been devastating – the Government now agrees that it counseled the judge to err, but argues that the error was really harmless and did not prejudice

Hayes' ability to present his defense. We look at such series of events with something less than enthusiasm.

Even though application of the attorney-client privilege was erroneous here, and the evidence sought was probative, subsequent events in the trial persuade us that the error was, in fact, harmless. Substantially all of the testimony that the court initially excluded was later admitted through the tax lawyer. Ultimately the attorney was permitted to testify that he attempted to contact Thom to obtain proof that the gold transactions occurred. On numerous occasions, he tried to make arrangements through Thom's lawyers in Switzerland and Zimbabwe to make Thom available for consultation. Thom failed to show up at scheduled meetings on thirty to forty occasions. He was never successful in persuading Thom to meet with him in the United States, or to secure Thom's testimony overseas. Finally, he retained another law firm to research whether Thom could be forced to provide documents and testimony. In the end, he did receive a large box of documents from Thom.

Another of Hayes' attorneys testified that he wrote letters, telephoned and sent telexes in an attempt to obtain documents sought by the IRS, and that he ultimately received 292 such documents. Substantial correspondence from that attorney's files was also admitted. Hayes, himself, testified that he employed these attorneys to secure documents from Thom, and to their efforts in doing so.

The only evidence which remained excluded – regarding the contents of the eleven letters that Hayes received from Thom, and Hayes' demeanor throughout

the attorneys' representation of him – was properly excluded on grounds other than attorney-client privilege.

There was substantial evidence in the record to support Hayes' defense that he acted in good faith, and that he attempted to contact Thom to assure himself that Thom was also acting in good faith. For that reason, Hayes was entitled to and did make this argument to the jury. Subsequently, Hayes requested and the court gave a good faith instruction. The jury's failure to credit that theory of defense does not reflect a failure to hear it.

We conclude that Hayes was able to present his defense theory and was not prejudiced by the court's incorrect evidentiary ruling.

Finding no merit in any of the other allegations of reversible error, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8144

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN E. HAYES, JR.,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

---

(Filed Mar. 2, 1995)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BLACK and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-8144

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN E. HAYES, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

(Filed Mar. 21, 1995)

ORDER:

( ) The motion of Appellant, John E. Hayes, Jr. for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✔) The motion of Appellant, John E. Hayes, Jr. for (✔) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 60 days from this date, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the

Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ___ for a further stay of the issuance of the mandate is GRANTED to and including ___, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ___ for a further stay of the issuance of the mandate is DENIED.

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

United States District Court

NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA

V.

JOHN E. HAYES, JR.

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:88-cr-65-1

(Filed Jan. 29, 1993)

Leonard Franco
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[[ ] guilty [ ] nolo contendere] as to count(s) ___, and [XX] not guilty as to count(s) 1, 2, 3, 6, and 7 [sic].

THERE WAS A:
[[ ] finding [XX] verdict] of guilty as to count(s) 1, 2, 3, and 6.

THERE WAS A:
[[ ] finding [XX] verdict] of not guilty as to count(s) 7 and 8. [ ] judgment of acquittal as to count(s) ___. The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: on or about January 1, 1977 up to and including on or about December 31, 1982, violation of Title 18 USC §§ 1343, 2314, 371 and 2.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the Custody of the Attorney General to be imprisoned for a term of Thirty-

seven (37) months on each of counts one and three to run concurrent with each other; Forty-six (46) months on count two to run consecutive to the sentence imposed in counts one and three; on count 6, imposition of the sentence is suspended and the defendant is placed on probation for Five (5) years, said term to begin upon the legal expiration of the terms imponse [sic] in counts one, two, and three.

This sentence is pursuant to 18 USC § 4205 (b)(2).

It is Further Ordered that the defendant pay Fines in the amount of $10,000.00 on count one; $10,000.00 on count two; and $1,000.00 on count three. Following are two additional conditions of probation; (1) The defendant shall not own, possess, or have under his control a firearm of any kind or other dangerous weapon; (2) The defendant shall make full and complete disclosure of personal and business finances and shall submit to an audit of personal and business financial records as requested by the U.S. Probation Officer.

The fines are to be paid under the terms and conditions of the Probation Office.

In addition to any conditions of probation imposed above, IT IS ORDERED, that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) one and six as follows:

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendants shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

January 28, 1993
Date of Imposition
of Sentence

/s/ Robert L. Vining, Jr.
Signature of Judicial
Officer

ROBERT L. VINING, JR.
US District Judge
Name and Title of
Judicial Officer

Jan. 28, 1993
Date

ATTEST: A TRUE COPY
AFFIRMED THIS
JAN 29 1993
Luther D. Thomas,
Clerk
/s/ B. Hatcher
Deputy Clerk

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on ____ to ___ at ___, the institution
Date
designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NO. CR87-02N
JOHN E. HAYES, JR., and FREDERICK G. THOM	:	(UNDER SEAL)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on March 9, 1987. At that time, the United States requested that the Indictment be sealed so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he now resides.

Because the government of Zimbabwe (formerly Rhodesia) does not recognize the extradition treaty that had been in effect between the United States and Rhodesia, we sought and received the assistance of the British government to act on our behalf in seeking Thom's arrest and removal. The British authorities are engaged in continuing efforts to effect Thom's arrest and extradition or deportation. They are unable at this time, however, to predict when this will be accomplished.

In addition to the British actions, the United States has taken steps to obtain Thom's arrest if he should travel outside Zimbabwe.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
UNITED STATES ATTORNEY

/s/ Gerrilyn G. Brill
for JOHN D. ARTERBERRY
TRIAL ATTORNEY
UNITED STATES DEPARTMENT
OF JUSTICE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA)	
)	CRIMINAL
v.)	ACTION
)	
JOHN E. HAYES, JR., and)	NO. CR87-02N
FREDERICK G. THOM)	
)	(UNDER SEAL)
)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is the second such filing submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on March 9, 1987. At that time, the United States requested that the Indictment be sealed so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he now resides.

The British authorities have continued their efforts on behalf of the United States to obtain the cooperation of Zimbabwean officials to effect Thom's extradition or deportation. (As we noted in our June 1987 report, the government of Zimbabwe (formerly Rhodesia) does not recognize the extradition treaty that had been in effect between the United States and Rhodesia.) During the week of August 31, 1987, officials of the United Kingdom and Zimbabwe conferred in London. At the time this

report was being prepared, however, no information was available about developments regarding Thom. When the United States receives a report on these recent meetings, it will bring to the Court's attention any significant developments bearing on Thom's extradition.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Trial Attorney
United States Department
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Post Office 28188
Central Station
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Telephone: (202) 786-4363

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA)	CRIMINAL ACTION
v.)	
JOHN E. HAYES, JR., and FREDERICK G. THOM)	NO. CR87-02N
)	(UNDER SEAL)
)	(Filed Feb. 22, 1988)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is the third such filing submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on March 9, 1987. At that time, the United States requested that the Indictment be sealed so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he now resides.

In the government's September status report we referred to efforts undertaken by officials of the British government on our behalf to secure the cooperation of Zimbabwe in extraditing or deporting Thom. Shortly after that report was filed with the Court, the government of Zimbabwe advised our embassy there that it would consider deporting Thom and asked for details about

Thom and the charges against him. The requested information was wired to the United States Embassy in Zimbabwe for delivery to the appropriate Zimbabwean officials. We are now waiting for a response from these officials as to whether and when Thom will be deported.

We are hopeful that we will receive the Zimbabwean response in the near future and we will apprise the Court as soon as it is received.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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DATED: DECEMBER 23, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. JOHN E. HAYES, JR., FREDERICK G. THOM RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	CRIMINAL ACTION NO. CR88-65A (UNDER SEAL) (Filed May 13, 1988)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988. At that time, the United States requested that the Indictment be sealed so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he now resides.

Officials of another foreign government have been acting on our behalf to secure the cooperation of Zimbabwe in extraditing or deporting Thom. As a result of these efforts, the government of Zimbabwe advised our embassy there that it would consider deporting Thom. In

early April, however, our embassy reported that information recently received from Zimbabwean officials indicated that problems had arisen that could delay or ultimately block Thom's deportation or extradition.

In light of this development, the officials of the other foreign government are exploring a different avenue to obtain Thom's deportation. These officials believe that by mid-summer they should know whether this approach can succeed.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
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DATED: MAY 12, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL
v.	)	ACTION
	)	
JOHN E. HAYES, JR., FREDERICK G. THOM RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	NO. CR88-65A
	)	(UNDER SEAL)
	)	
	)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he now resides.

In previous reports we have referred to the assistance of officials of another foreign government who have been acting on our behalf to secure the cooperation of Zimbabwe in extraditing or deporting Thom. This month these officials are traveling to Zimbabwe where they will confer with the appropriate authorities about the prospects for effecting the arrest or deportation of Thom.

It is our expectation that a decision by Zimbabwe regarding the Thom matter will be forthcoming within the next sixty days.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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DATED: August 10, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. JOHN E. HAYES, JR., FREDERICK G. THOM RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	CRIMINAL ACTION NO. CR88-65A (UNDER SEAL) (Filed Nov. 7, 1988)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

In our last report we advised the Court that we expected a decision by the government of Zimbabwe on our request for Thom's extradition or deportation. Shortly after that report was filed, Zimbabwean officials indicated that they would grant us assistance in apprehending Thom. Before these officials acted, however, Thom reportedly fled the country.

We are now making every effort to locate Thom by concentrating our search in certain foreign countries with which he has financial or family ties.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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DATED: November 4, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. JOHN E. HAYES, JR., FREDERICK G. THOM RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	CRIMINAL DIVISION NO. CR88-65A (UNDER SEAL) (Filed Feb. 9, 1989)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

We noted in previous reports that soon after the government of Zimbabwe indicated that it would grant us assistance in apprehending Thom, he reportedly fled the country.

While we are continuing our efforts to locate Thom in other foreign countries to which he may have fled, we believe he may have surreptitiously reentered Zimbabwe. We therefore have asked our embassy in Zimbabwe to inquire of the Zimbabwean authorities whether they

would investigate this possibility. Recent contacts with the government of Zimbabwe indicate continued cooperation and our embassy representatives expect to meet with senior Zimbabwean officials within the next two weeks to pursue this matter.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Senior Litigation Counsel
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DATED: February 7, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL
v.	)	DIVISION
	)	
JOHN E. HAYES, JR., FREDERICK G. THOM RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	NO. CR88-65A
	)	(UNDER SEAL)
	)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

We have noted in previous reports that soon after the government of Zimbabwe indicated that it would grant us assistance in apprehending Thom, he reportedly fled the country. Thom has not yet been located.

In our last report we referred to an upcoming meeting between representatives of our embassy and senior Zimbabwean government officials regarding Thom's whereabouts and the Zimbabwean government's position on extraditing Thom, if and when he is apprehended. At

that meeting, we were advised that Zimbabwe would consider extraditing Thom if the request were made through the British government. We were unable, however, to obtain any definitive information about Thom's whereabouts.

Our efforts to locate Thom are continuing and we anticipate that we will receive the assistance of the British government in extraditing Thom should he be found in Zimbabwe.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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DATED: May 11, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)	CRIMINAL
)	DIVISION
v.)	
)	
JOHN E. HAYES, JR., FREDERICK)	NO. CR88-65A
G. THOM, RONALD M. WILSON,)	(UNDER SEAL)
and ROME FINANCE COMPANY,)	
INC.)	(Filed
)	Aug. 17, 1989)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

Thom reportedly fled Zimbabwe last year soon after the government of Zimbabwe indicated that it would grant us assistance in apprehending and deporting him. Since that time we have continued our efforts to identify his whereabouts.

Recent reports indicate that Thom has returned secretly to Zimbabwe and is in hiding there. Our embassy plans to confer within the next few days with senior officials of the Zimbabwean government about Thom and

whether he has returned to their jurisdiction. If he is located in Zimbabwe, we will seek his immediate arrest and extradition or deportation.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Senior Litigation Counsel
United States Department
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DATED: August 16, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL DIVISION
v.	)	
	)	NO. CR88-65A
JOHN E. HAYES, JR.,	)	
FREDERICK G. THOM,	)	(UNDER SEAL)
RONALD M. WILSON, and	)	
ROME FINANCE COMPANY, INC.	)	(Filed Dec. 6, 1989)
	)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

Although Thom reportedly fled Zimbabwe last year soon after the government of Zimbabwe indicated that it would grant us assistance in apprehending and deporting him, recent reports indicate that he has returned secretly to Zimbabwe. Our embassy has conferred with senior officials of the Zimbabwean government about whether Thom has returned to their jurisdiction but has been unable to obtain a definitive response. A formal inquiry is

to be filed next week by our embassy with the Zimbabwean government seeking information about Thom's whereabouts.

In addition to efforts focused on Zimbabwe, Interpol notices seeking Thom's location were issued in September.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Senior Litigation Counsel
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DATED: December 4, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL DIVISION
v.	)	NO. CR88-65A
JOHN E. HAYES, JR., FREDERICK G. THOM, RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	(UNDER SEAL)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

In recent conferences with representatives of our embassy, Zimbabwean government officials maintained that Thom is no longer in their country. Because this is contrary to information we have received through United Kingdom sources, we have asked our embassy to request that the government of Zimbabwe conduct inquiries with members of Thom's family who still reside there.

In addition to efforts focused on Zimbabwe, Interpol notices seeking Thom's location remain outstanding.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

ROBERT L. BARR, JR.
United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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DATED: March 8, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL DIVISION
v.	)	
	)	NO. CR88-65A
JOHN E. HAYES, JR.,	)	
FREDERICK G. THOM,	)	(UNDER SEAL)
RONALD M. WILSON, and	)	
ROME FINANCE COMPANY, INC.	)	(Filed Jun. 5, 1990)
	)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Zimbabwe, where he resided.

Although some Zimbabwean officials earlier had indicated that Thom had left Zimbabwe, our embassy's inquiries suggest he continues to live there.

Last month representatives of our embassy in Zimbabwe met with the Attorney General and with the Minister of Justice of Zimbabwe to discuss our request for Thom's extradition or deportation. The Minister of Justice

suggested that his country would deport Thom to the United Kingdom if the United Kingdom concurs. The United States then would extradite Thom from the United Kingdom. We now are exploring this possibility with our embassy in London.

In addition to efforts focused on Zimbabwe, Interpol notices seeking Thom's location remain outstanding.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

RAY RUKSTELE
Acting United States Attorney

/s/ John D. Arterberry
JOHN D. ARTERBERRY
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United States Department
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Post Office Box 28188
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DATED: June 4, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL DIVISION
v.	)	
	)	NO. CR88-65A
JOHN E. HAYES, JR.,	)	
FREDERICK G. THOM,	)	(UNDER SEAL)
RONALD M. WILSON, and	)	
ROME FINANCE COMPANY, INC.	)	(Filed Sep. 12, 1990)
	)	

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Harare, Zimbabwe, where he resides.

We have noted in previous reports that Interpol notices seeking Thom's location have been posted with various foreign Interpol offices. Recently, Interpol in Harare advised us that Thom was on vacation in England. The Interpol communication also stated that Thom's destination in England was unknown and that he was expected to return to Zimbabwe in August.

We have responded to this alert by notifying the appropriate police authorities in London, where we have a provisional arrest warrant on file, and by seeking additional details about Thom's travel from our embassy in Zimbabwe. As of this date, however, Thom has not been located.

Meanwhile, discussions are continuing with the British government about a possible request by them to the government of Zimbabwe on our behalf for Thom's deportation to England and subsequent extradition to the United States.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

JOE D. WHITLEY
United States Attorney

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DATED: September 10, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL DIVISION
v.	)	
	)	NO. CR88-65A
JOHN E. HAYES, JR., FREDERICK G. THOM, RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	(UNDER SEAL)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of this Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Harare, Zimbabwe, where he resides.

In our September 1990 filing we reported that the Interpol office in Harare had advised us that Thom was planning to vacation in England during the month of August. Extensive efforts by the British authorities to locate Thom, however, proved unsuccessful and we later confirmed his presence in Zimbabwe.

Through our international affairs office we have requested that discussions continue with the British Government to obtain its intercession with the Government of Zimbabwe to secure Thom's deportation to England, where he then could be extradited to the United States. We also are exploring the advisability of direct negotiations with an attorney in Zimbabwe who represents Thom.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

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DATED: December 14, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL DIVISION
v.	)	NO. CR88-65A
JOHN E. HAYES, JR., FREDERICK G. THOM, RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	(UNDER SEAL)
	)	(Filed Mar. 29, 1991)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of the Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Harare, Zimbabwe, where he resides.

The Department of Justice has made a formal request to the British Government for its intercession with the Government of Zimbabwe to secure Thom's deportation to England, where he then could be extradited to the United States. Although we also have been exploring the advisability of direct negotiations with an attorney in Zimbabwe who represents Thom, a decision about this course of action will be held in abeyance pending the

response of the British authorities to our request for assistance.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

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United States Attorney

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DATED: March 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL DIVISION
v.	)	NO. CR88-65A
JOHN E. HAYES, JR., FREDERICK G. THOM, RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	)	(UNDER SEAL)
	)	(Filed Jun. 28, 1991)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of the Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Harare, Zimbabwe, where he resides.

Following discussions with British law enforcement authorities prompted by our most recent request to the British Government for its assistance in securing Thom's deportation, the Department of Justice is examining whether it can retain private counsel in the United Kingdom to block any funds Thom may have in England. The British officials have advised us that this approach, which may provide sufficient impetus to cause Thom to submit

to this Court's jurisdiction, appears more practical and expeditious than seeking Thom's deportation.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

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DATED: June 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	CRIMINAL DIVISION
v.	NO. CR88-65A
JOHN E. HAYES, JR., FREDERICK G. THOM, RONALD M. WILSON, and ROME FINANCE COMPANY, INC.	(UNDER SEAL)
	(Filed Nov. 29, 1991)

GOVERNMENT'S REPORT TO MAGISTRATE

This report is submitted pursuant to order of the Court entered at the time the Indictment in this case was sealed on February 9, 1988, at the request of the United States so that the arrest and extradition of defendant Frederick G. Thom could be accomplished. As part of the seal order, the Court directed the government to submit every three months a status report concerning progress in obtaining Thom's arrest and extradition from Harare, Zimbabwe, where he resides.

In our preceding filing, we reported that the Department of Justice was examining whether it could retain private counsel in the United Kingdom to block any funds Thom may have in England. This approach has not proven fruitful because we have been unable to locate any funds there that can be traced to Thom.

Last month, however, an opportunity arose in connection with a matter of interest to our government and the Government of Zimbabwe for a renewal of our request for Thom's extradition. There is reason to believe that, by joining our request with this matter of mutual interest, our chances for a favorable response will be enhanced.

The United States respectfully requests that this status report be placed under seal.

Respectfully submitted,

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DATED: November 26, 1991

(2)

Supreme Court, U.S.
FILED
JUL 24 1995

No. 94-1924

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN E. HAYES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to a speedy trial was violated by the sealing of the indictment against him in order to facilitate the apprehension of his overseas co-defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1924

JOHN E. HAYES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 40 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1994. A petition for rehearing was denied on March 2, 1995. Pet. App. 12-13. The petition for a writ of certiorari was filed on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, peti-

tioner was convicted of conspiracy to commit wire fraud and interstate transportation of money taken by fraud, in violation of 18 U.S.C. 371; two substantive wire fraud counts, in violation of 18 U.S.C. 1343; and interstate transportation of money taken by fraud, in violation of 18 U.S.C. 2314. He was sentenced to a total of 83 months' confinement and a fine. The court of appeals affirmed. Pet. App. 1-11, 16-17.

1. Between 1977 and 1981, petitioner, Frederick Thom, and others executed a fraudulent tax-shelter scheme that deprived investors of nearly $14 million. Petitioner falsely told investors that he had established a grantor trust to trade in gold bullion and foreign currency on margin in foreign markets, and that the trades would yield profits and tax benefits for the investors. Petitioner also falsely represented that the trades would be handled by reputable financial institutions in Switzerland. In fact, petitioner diverted the investors' money into organizations that either he or Thom controlled, and carried out a series of sham transactions to deceive investors that their money was being traded as advertised. In addition, petitioner sent false trading documents to investors to conceal the fraudulent scheme. Gov't C.A. Br. 5-14.

On March 9, 1987, petitioner and Thom were indicted for their fraudulent scheme. On the government's motion, the district court sealed the indictment to facilitate the arrest of Thom, a foreign national who was then known to be residing in Zimbabwe. The court ordered the government to file a status report at least every 90 days detailing its efforts to arrest and extradite Thom. On February 9, 1988, a superseding indictment was returned against petitioner, Thom, and others. That indictment was

also sealed, subject to the same reporting obligation. Pet. App. 2-3.

Between 1987 and November 29, 1991, the government filed 17 status reports with the district court. Those reports described the government's lengthy and complex diplomatic efforts to obtain Thom's arrest, and noted that securing Thom's arrest had been greatly complicated by the fact that the United States and Zimbabwe had no extradition treaty. Specifically, the government asked Zimbabwe several times to arrest and deport Thom. Those efforts were unsuccessful. The government next asked the United Kingdom to intercede on its behalf. Those efforts also failed. In addition, during the period in which the indictment was sealed, Thom was reported to have twice left Zimbabwe temporarily. During those periods, the United States took steps to locate him elsewhere. Those steps included making inquiries to the embassy of Zimbabwe and to Interpol. On January 16, 1992, having exhausted avenues to secure Thom's presence, the government asked that the indictment be unsealed, so that it could proceed to trial against petitioner. Pet. App. 6-7, 21-54.

Petitioner was arraigned on February 5, 1992. On March 10, 1992, petitioner moved that his case be certified as complex under 18 U.S.C. 3161(h)(8)(B)(ii), and waived his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, so that he could prepare his defense. The district court granted that motion the following day, and excluded the period between June 1, 1992, and November 2, 1992, the date that trial began, from Speedy Trial Act calculations. In the district court, petitioner did not claim that any of his constitutional rights had been violated by the sealing of the indictment. Pet. App. 3-4.

2. The court of appeals affirmed petitioner's conviction. It rejected petitioner's claim that he was denied due process of law because of pre-indictment delay, as well as his claim that his Sixth Amendment right to a speedy trial had been violated by the delay between indictment and trial. The court reviewed those two claims for plain error, because petitioner had not raised them in the district court. Pet. App. 4-5.

The court rejected petitioner's claim of pre-indictment delay because petitioner had not shown "that the delay was the product of deliberate action by the Government to gain a tactical advantage." Rather, the court noted, the delay resulted from the government's continuing investigation. Pet. App. 3-4.

Evaluating petitioner's speedy trial claim, the court considered the four factors identified in *Barker* v. *Wingo*, 407 U.S. 514 (1972): the length of the delay, the cause of that delay, whether and when the defendant requested a speedy trial, and the prejudice to the defendant. The court concluded that the five-year period between indictment and trial was long enough to warrant examination of the other factors identified in *Barker*. Pet. App. 6. With respect to the cause for the delay, the court concluded that sealing the indictment had been necessary to facilitate the government's legitimate goal of arresting co-defendant Thom, and that "the Government's persistence in trying to locate Thom was not unreasonable." Pet. App. 7. The court noted that the government had been diligent in its efforts to apprehend Thom: It had sought the help of Zimbabwe officials directly, it had enlisted the United Kingdom to intercede on its behalf, and it had attempted to locate Thom when he was believed to have left Zimbabwe

temporarily. *Id.* at 6-7. The court also noted that petitioner had neither requested a speedy trial nor raised a speedy trial claim in the district court. Instead, the court observed, he had effectively delayed trial by successfully moving to have the case declared "complex," thus resulting in the exclusion of time from Speedy Trial Act calculations. *Id.* at 8. Finally, the court held, petitioner's "conclusory" claims of prejudice did not meet his burden to establish actual prejudice. *Ibid.*

ARGUMENT

Petitioner claims (Pet. 10-29) that he was denied his Sixth Amendment right to a speedy trial because of the delay that occurred while the government attempted to secure the arrest of his co-defendant. The court of appeals' application of the four-factor test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), to the facts of this case was correct and, as petitioner implicitly concedes, does not conflict with any court of appeals decision. See Pet. 10 (noting novelty of the issue). Review is also unwarranted because the court of appeals correctly applied the plain-error standard of review, see *United States* v. *Olano*, 113 S. Ct. 1770 (1993), and its treatment of the *Barker* factors is therefore inapposite to cases in which speedy trial claims were properly raised in the district court.

In *Barker*, this Court identified four factors to be taken into account in determining whether the Sixth Amendment right to a speedy trial has been violated: the length of the delay, the reason for the delay, whether and when the defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. *Barker*, 407 U.S. at 530; see also *Doggett* v. *United States*, 112 S. Ct. 2686, 2690

(1992). The Court identified the first factor, length of delay, as "to some extent a triggering mechanism," in that unless there is a period of delay that is presumptively prejudicial, "there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. The five-year period between petitioner's indictment and trial was sufficiently long to warrant consideration of the other *Barker* factors, see *Doggett*, 112 S. Ct. at 2691, but those factors cut against petitioner's claim.

As for the second *Barker* factor, the delay was caused by the government's extensive efforts to arrest and extradite petitioner's co-defendant, Thom. As the court of appeals held, the government reasonably concluded that those efforts could have been compromised had Thom been aware that an indictment was pending against him. See Pet. App. 6.[1] The government's interest in apprehending a co-defendant or securing the presence of an important witness has consistently been recognized as a legitimate basis for pretrial delay. See, *e.g.*, *United States* v. *Walker*, 1 F.3d 423, 427 (6th Cir. 1993) (delay caused by the need to take the deposition of a witness in a foreign country); *United States* v. *Koller*, 956 F.2d 1408, 1413-1415 (7th Cir. 1992) (unavailability of a government witness); *United States* v. *Tranakos*, 911 F.2d 1422, 1428 (10th Cir. 1990) (unavailability of a co-defendant). The lengthy period (more than four years) during

---

[1] Apart from its interest in not interfering with Thom's possible arrest and extradition, the government had a separate interest in trying petitioner and Thom together, to save judicial resources and to reduce the possibility of inconsistent verdicts. See *Zafiro* v. *United States*, 113 S. Ct. 933, 937 (1993).

which the indictment was sealed in this case reflected the inherent difficulty of obtaining assistance from a country, Zimbabwe, that did not have an extradition treaty with the United States, and of the other diplomatic measures taken by the government. And as the court of appeals held (Pet. App. 7), the government made "persistent and documented efforts to prosecute Thom." See *Doggett* v. *United States*, 112 S. Ct. at 2691 (deference is due findings below regarding whether government sought to find indicted defendant with diligence).[2]

The third *Barker* factor, assertion of the speedy trial right, also does not support petitioner's claim. Petitioner did not demand a speedy trial in the district court. In fact, far from vigorously pursuing a speedy trial in the district court, see *United States* v. *Koller*, 956 F.2d at 1414, petitioner waived his rights under the Speedy Trial Act by asking that the case be certified as complex under 18 U.S.C. 3161(h)(8)(B)(ii).[3]

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[2] Petitioner notes (Pet. 15-16) that the record is silent as to whether the district court ever required the government to justify (apart from its 17 status reports) the length of the delay caused by the attempts to arrest and extradite Thom. Those status reports, however, supply an ample justification for that delay. To the extent that petitioner argues that a fuller record on that question would have been beneficial, petitioner, by failing to raise any speedy trial claim below, bears responsibility for the lack of additional evidence. Petitioner also argues (Pet. 15) that the court of appeals erred by not independently appraising whether it was in fact realistic to believe that the government would apprehend Thom. But apart from noting that Thom successfully eluded the government, petitioner offers no basis for believing that the government's intention of arresting Thom was unreasonable.

[3] Petitioner appears to argue (Pet. 23-26) that, because the existence of a demand for a speedy trial is but one of the four

Finally, petitioner failed to demonstrate actual prejudice to his defense from the delay. As the court of appeals noted (Pet. App. 8), petitioner's conclusory claims of possible lost evidence and dimmed memories were speculative, and hence insufficient to show prejudice. See, *e.g.*, *United States* v. *Riley*, 991 F.2d 120, 124 (4th Cir.), cert. denied, 114 S. Ct. 392 (1993); *United States* v. *DeClue*, 899 F.2d 1465, 1471 (6th Cir. 1990).[4]

---

factors to be considered under *Barker*, the court of appeals misapplied *Barker* when it held that his failure to claim a speedy trial violation in the district court triggered the plain error standard of review and required him to establish prejudice. The issue of whether a defendant has demanded a speedy trial in the district court, however, is separate from the issue of whether the absence of a speedy trial objection in the district court gives rise to plain-error review. *Barker* rejected a proposed rule that a defendant who fails to demand a speedy trial in the district court forfeits his right to do so, holding instead that the presence or absence of such a demand is "is one of the factors to be considered in an inquiry into the deprivation of the right." 407 U.S. at 528. *Barker*, however, did not in any way disturb the familiar rule that a defendant who fails to preserve a claim of a constitutional violation in the district court faces plain error review if he raises such a claim on appeal. *Id.* at 518-519. See *United States* v. *Olano*, 113 S. Ct. at 1776; *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) (collecting cases).

[4] Petitioner's claim (Pet. 28) that a government witness suffered a memory lapse on cross-examination does not demonstrate that he was prejudiced by that lapse. See *United States* v. *Tranakos*, 911 F.2d at 1429 (impaired memory of prosecution witness not prejudicial for speedy trial purposes) (collecting cases).

Petitioner's reliance (Pet. 26-29) on *Doggett* to excuse him from demonstrating actual prejudice is misplaced. In *Doggett*, this Court held that the government's extreme negligence in not bringing the defendant to trial for eight and one-half years justified presuming prejudice to the defendant's ability to defend himself —a presumption that the government in *Doggett* was unable to rebut. 112 S. Ct. at 2693-2694 & n.4. In this case, by contrast, the court of appeals did not find negligent conduct by the government, but rather, that the government acted diligently in bringing petitioner to trial. When the government is able to justify its delay, it remains the defendant's burden to establish specific prejudice. See *Doggett*, 112 S. Ct. at 2693 ("Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense."). In any event, in light of the applicability of the plain error standard, petitioner bore the burden to establish actual prejudice, Pet. App. 8; *Olano*, 113 S. Ct. at 1778, and his failure to do so precludes any relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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(3)

No. 94-1924

In The

Supreme Court of the United States

October Term, 1994

JOHN E. HAYES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER, JOHN E. HAYES, JR.

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6 pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE AN INDICTMENT IS SEALED FOR ALMOST FIVE YEARS, WHILE THE GOVERNMENT SEEKS TO LOCATE, APPREHEND AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, SHOULD A COURT ANALYZING WHETHER, FOR SPEEDY TRIAL PURPOSES, THE DELAY IS CHARGED AGAINST THE GOVERNMENT, EVALUATE ONLY WHETHER THE GOVERNMENT WAS EXERCISING REASONABLE DILIGENCE TO APPREHEND THE CODEFENDANT; OR SHOULD IT DETERMINE WHETHER THE GOVERNMENT'S EFFORTS TO CAPTURE THE CODEFENDANT WERE REASONABLY LIKELY TO RESULT IN A PROMPTLY-HELD TRIAL FOR THE AVAILABLE DEFENDANT, WHO IS UNAWARE OF THE PENDING SEALED CHARGE?

II.

WHERE AN INDICTMENT IS SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, IN ORDER THAT THE GOVERNMENT CAN UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, IS THE AVAILABLE DEFENDANT'S FAILURE TO MOVE TO DISMISS THE INDICTMENT ONCE UNSEALED, AND HIS SUBSEQUENT REQUEST TO HAVE THE CASE DECLARED "COMPLEX" UNDER THE SPEEDY TRIAL

QUESTIONS PRESENTED FOR REVIEW – Continued

ACT, 18 U.S.C. § 3161, *ET SEQ.*, IN ORDER TO PREPARE TO DEFEND AGAINST THE CHARGES, SOME OF WHICH RELATED TO EVENTS 15 YEARS EARLIER, FATAL TO A FINDING THAT HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS VIOLATED?

III.

DID THE COURT OF APPEALS ERR UNDER *DOGGETT V. UNITED STATES*, 505 U.S. ___ (1992), BY NOT PRESUMING PREJUDICE TO PETITIONER, FROM THE DELAY RESULTING FROM AN INDICTMENT BEING SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, INVOLVING SOME ALLEGATIONS THEN UP TO FIFTEEN YEARS OLD, WHERE THE DELAY OCCURRED SO THAT THE GOVERNMENT COULD UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, AND DURING THE DELAY, THE MAGISTRATE THEN SUPERVISING THE CASE MADE NO INQUIRY AS TO HOW THE DELAY IMPACTED ON THE RIGHT TO A SPEEDY TRIAL FOR PETITIONER, WHO WAS AVAILABLE FOR TRIAL DURING THE ENTIRE PERIOD?

ARGUMENT

The Government, in its opposition to the petition, attempts to downplay both the length of delay in this case and its significance to a conclusion that Petitioner's Sixth Amendment rights were violated.

Petitioner submits that the Eleventh Circuit's analysis of the Sixth Amendment issues ignored consideration of *Hayes'* right to a speedy trial when it held that the Government had a legitimate reason to delay petitioner's trial by trying to secure co-defendant Fred Thom's arrest. To conclude that the Government in the first instance had a legitimate interest in a joint trial and in securing Thom for trial does not, and should not, end the inquiry. A court sanctioning delay for the apprehension of a fugitive co-defendant must evaluate the available defendant's interest in preparing a defense and resolving the charges against him. Regardless of the Government's "persistence" in securing Thom, a conclusion by the Eleventh Circuit with which petitioner takes issue, the apparent unquestioning acceptance of the status reports by the Magistrate afforded Petitioner no such consideration. This is particularly true where the length of the delay is measured in years, not months. At some point, long passed in this case, the delay became, as a matter of law, "unreasonable."

The cases relied upon by the Government, where delay in bringing the defendant to trial was condoned due to an absent witness or co-defendant, are clearly inapplicable here. First and foremost, in each of those cases, the defendant was aware of the charges against him, and thus could continue to marshal his evidence and

prepare his defense during the intervening period. Second, the greatest period of delay countenanced in those cases was less than one year. *See, United States v. Walker,* 1 F.3d 423, 427 (6th Cir. 1993) (where a material witness was imprisoned in Japan; total delay: 358 days); *United States v. Koller,* 956 F.2d 1408, 1413 (7th Cir. 1992) (where a material witness suffered a heart attack and had bypass surgery; total delay: eight and one-half months); *United States v. Tranakos,* 911 F.2d 1422, 1428 (10th Cir. 1990) (where a defendant's absence *following* arraignment of the other defendants delayed the trial; total delay: eight months).

That the Government may have had a proper motive for initially delaying Petitioner's trial does not dispose of Petitioner's Speedy Trial claim. In *United States v. Hamilton,* 46 F.3d 271, 278-9 (3rd Cir. 1995), the trial court dismissed an indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161. There, the Government had moved to postpone the trial to allow additional time for three essential witnesses to resolve their own cases, so that they could testify at trial against the defendant. The Third Circuit affirmed, agreeing that the Government had a legitimate goal of trying to obtain the witnesses' testimony, but concluding that they were not thereby "unavailable" under the Speedy Trial Act. Thus, the time of the delay was not excludable under the Speedy Trial Act. The *Hamilton* Court recognized that the Government's decision to grant witnesses use immunity had collateral legal consequences, whether its subsequent inability to use the witnesses' testimony against them, or with respect to calculation of excludable time under the Speedy Trial Act in the target defendant's case.

Similarly, the Government's decision to forestall unsealing Hayes' indictment so that it could attempt to secure Thom's presence, while initially a perfectly legitimate prosecutorial action, was not without ultimate implication to Hayes' Sixth Amendment rights. Like the Government's immunity decision in *Hamilton*, its desire to delay Hayes' trial until apprehending Thom did not immunize the Government from the resulting violation of Hayes' Speedy Trial rights. The Eleventh Circuit itself previously recognized that the legitimate prosecution goal of securing the presence of all defendants for trial could not support endless delay, because, under the Speedy Trial Act, the rights of the available defendants also had to be preserved. *United States v. Khoury*, 901 F.2d 948, 973 (11th Cir. 1990). Well before the government moved to unseal the indictment in this case, it was incumbent upon the supervising Magistrate and the Government to recognize that the delay in securing Thom was unreasonably depriving Hayes of his independent right to have adjudicated the grand jury's charges against him.

Moreover, the Eleventh Circuit did not, contrary to the Government's assertion (Respondent's Brief, at 9), conclude that the Government acted diligently in bringing Hayes to trial. It concluded that its diligence in trying to bring Thom to justice was reasonable. While Petitioner does not agree with that conclusion, it is evident that missing from the Eleventh Circuit's analysis, as was absent in the Magistrate's supposed supervision of the case during the delay, was a consideration of the impact of the delay on Hayes' right to know about and timely

dispose of the charges lodged against him. That Petitioner found it necessary and prudent to seek relief from the time limitations imposed by the Speedy Trial Act, so that he could have some additional time to prepare a defense to charges which, by then, spanned almost 15 years, is unremarkable.

Finally, the Eleventh Circuit's analysis of the *Barker v. Wingo*, 407 U.S. 514 (1972), factors, as applied in *Doggett v. United States*, 505 U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 120 (1992), ignored a crucial distinction between *Doggett* and this case. In *Doggett*, this Court was concerned with the government's efforts, or lack thereof, in bringing that single defendant to trial. The government's diligence in such circumstances focuses, necessarily, on just two parties, the Government and the missing defendant. In those cases, the inquiry is, did the Government act diligently, and did the missing defendant contribute to the government's inability to find him? Here, however, there was a third party – the available defendant – to consider, and no amount of diligence by the Government over five years, assuming it was diligent, justified keeping the available defendant "in the dark" about the pending charges for such a long period of time.

Since the length of delay was unreasonable, and the Government's efforts *vis-a-vis* Hayes were tantamount to the extreme negligence that Respondent recognizes under *Doggett* causes prejudice to be presumed, the court below should have presumed prejudice to Petitioner. Moreover, as noted in *Doggett*, the longer the delay, the greater the presumptive prejudice, *id.*, at 2693, particularly since failing to recall what has been forgotten is the most pernicious type of prejudice. Considering that (1) Petitioner

was acquitted of all the more "recent" charges in the indictment and convicted only of those charges which at most occurred between 10 and 15 years prior to the unsealing of the indictment; and (2) he pointed specifically to the inability of Joan Rose, the key "insider" to testify at trial, to recall the purpose of money transfers which the government contended were proceeds of fraud, but the defense contended were unrelated payments, and those transfers constituted the violations of which Petitioner was convicted, prejudice was amply demonstrated.

CONCLUSION

WHEREFORE, Petitioner John E. Hayes, Jr., respectfully requests the Court to grant his petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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